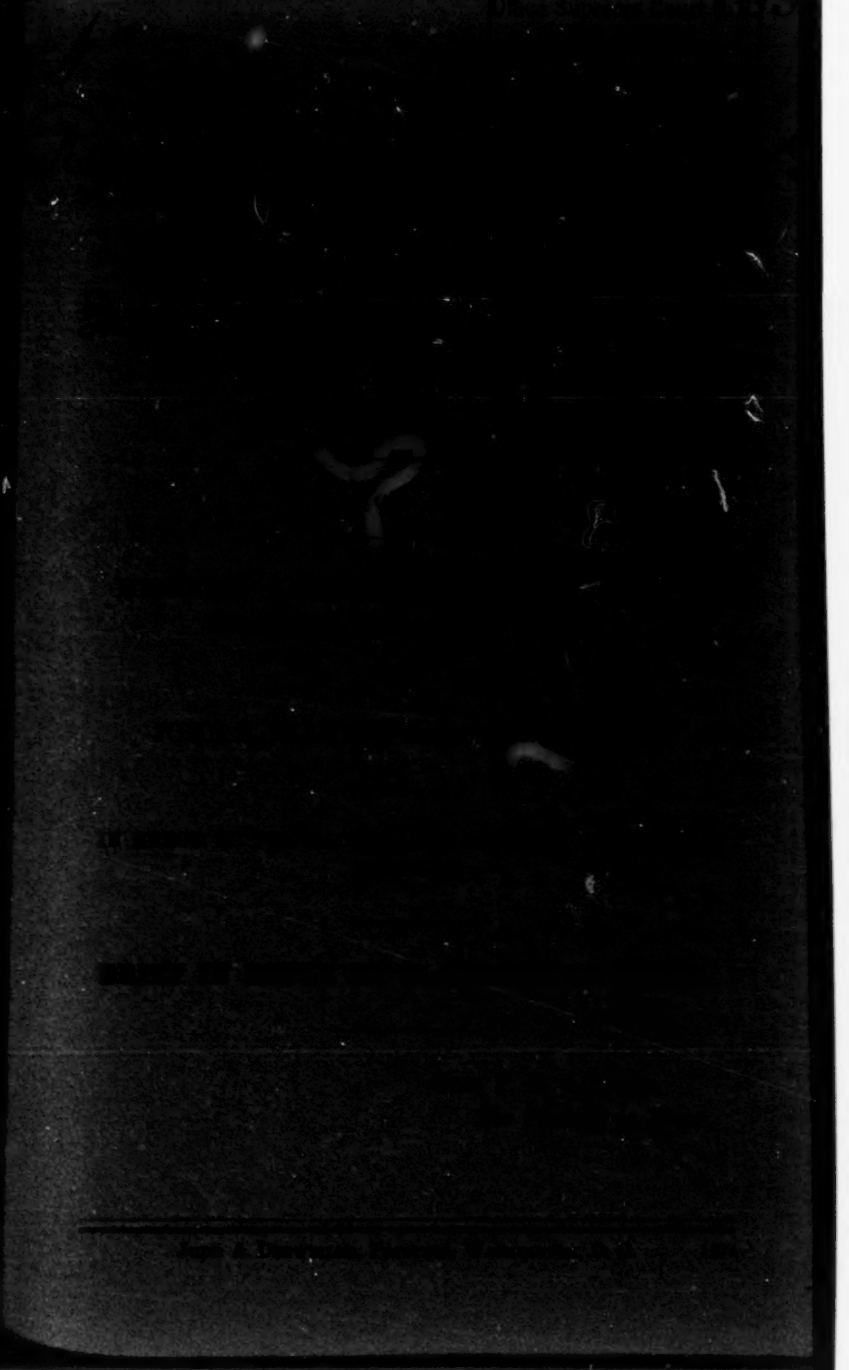

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 148.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN S. ELLIOTT, DEFENDANT IN ERROR.

IN ERROR TO THE KANSAS CITY COURT OF APPEALS OF MISSOURI.

BRIEF IN REPLY BY PLAINTIFF IN ERROR.

The defendant in error, through the brief filed in his behalf, seems to place his principal reliance upon the proposition that the Federal question involved in this case was not presented with that formality that is necessary to entitle the plaintiff in error to a review of the case by this court. In support of that position a number of cases are cited from Missouri, which it is claimed establish the proposition that the supreme court of the State of Missouri cannot

consider a constitutional question unless it appears that the same was formally presented by some pleading or instruction in the trial court. An examination of the cases referred to, however, will satisfy this court that all that the supreme court of Missouri was considering in those cases was the question of whether or not the appeal in the particular case would lie to the supreme court or to the court of appeals, and in determining that question it unquestionably did rule that to make a case appealable to the supreme court the question must have been expressly presented in the trial court, for the reason that whether the case was appealable to one court or another was a matter to be determined at the time that the appeal was allowed and to be determined by the court granting the appeal, and as a matter of course the jurisdiction of the appeal must depend upon the record as it existed in the lower court, because the question necessary to be determined then could not be decided by something that might occur afterwards, but it never was intended to rule that either the constitution of the State of Missouri or the Constitution of the United States should be deliberately violated because the point had not been specifically made at some particular stage of the proceeding. In the constitution of Missouri the appellate jurisdiction of the supreme court and the courts of appeals is not expressed in the clearest manner. That jurisdiction of these different courts is to be ascertained from the constitution, as originally adopted, in 1875, and as amended in 1884. In the original constitution there was a peculiar scheme of appellate jurisdiction, lodging in the supreme court all appellate jurisdiction for the State, except the city of St. Louis and a few neighboring counties. The St. Louis

court of appeals was created with appellate jurisdiction in all cases, regardless of the amounts and regardless of the questions, in that city and those counties, with the right of appeal from the St. Louis court of appeals to the supreme court in certain cases, involving more than a certain amount, and those involving the construction of the Constitution of the United States or of the State of Missouri, and cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question, and certain other cases involving revenue laws, title to real estate, public offices, and where counties were parties. Then, in 1884, the Kansas City court of appeals was established, and the State was divided into two divisions, one being assigned to the St. Louis court of appeals, and the other to the Kansas City court of appeals, and, instead of prescribing the jurisdiction of the supreme court and of the courts of appeals in direct terms, it was accomplished through a rather involved statement to the effect that in all such cases as were formerly appealable from the St. Louis court of appeals to the supreme court appeals should lie from all portions of the State directly to the supreme court, and in all other cases appeals should lie directly to the respective courts of appeals; so that the whole question, so far as the jurisdiction of the court of appeals or the supreme court is concerned, is determined by the class in which the case may fall under these provisions, and since, as already suggested, the trial court must determine while it still has jurisdiction of the case to which court the appeal shall go, and as the appellate court must afterwards determine that question with reference to the same time, the supreme court has ruled

in the cases cited by the defendant in error that such question can only be determined from the record as it existed in and came from the trial court.

In all of these cases the court will find some language indicating that the ruling made was with reference to the appellate jurisdiction of the supreme court, and for the purposes of jurisdiction the court looked only to the record as it came from the lower court. Necessarily the court said that, for the purposes of its jurisdiction, a constitutional question could not be injected in the case by the briefs of counsel, because those briefs did not exist when the appeal was granted and when the record was made up in the trial court, but were only filed when the case was ready for submission to the appellate court.

In this connection I desire to correct a mistake into which counsel for defendant in error has fallen when he says that the plaintiff in error, as appellant in the State court, prayed an appeal to the Kansas City court of appeals. Even if it were a fact that the plaintiff in error or its counsel had made a mistake on that subject, it could not control the jurisdiction of the courts, nor would such a mistake change the fact of the presence of a Federal question in the case; but as a matter of fact no such prayer was made. It is not in accordance with the practice in Missouri in perfecting appeals to ask that the same be sent to any particular court. It is not necessary to file any formal application or petition or writing whatever for an appeal. Under the practice in that State, it is simply necessary to file an affidavit stating that the affiant believes that the appellant is aggrieved by the judgment of the court, and that the appeal is not taken for vexation or delay;

this is all that is necessary to be filed; and thereupon the trial court grants the appeal and orders the case certified to whichever court it deems proper; so that whatever mistake was made in sending this case to the Kansas City court of appeals was not the mistake of the appellant in that case, plaintiff in error here, but simply was an additional error committed by the trial court, according to the theory that the plaintiff in error had of the case. The counsel for defendant in error further contends that this court is concluded by the ruling of the State court with reference to whether or not the Federal question was sufficiently presented in the State court; but certainly this cannot be seriously contended for. If so, it could be the means of preventing the review of any case by this court. No matter how palpable the question might be, yet, under the contention of the defendant in error, if the State court will say the Federal question was not presented with sufficient formality, yet, notwithstanding under any other theory and for any other purpose and to any other mind, the question was plainly in the case and certainly insisted upon, still this court could not review it. It is not necessary to repeat here, nor even to refer, to those cases in which this court has said that its jurisdiction cannot depend upon the assertion of the State court, either in favor of or against that jurisdiction, but that this court itself must examine the record in a case in order to see whether it involves and presents such question and in such manner as to invoke the exercise of the power conferred upon this court by the Constitution and laws of the United States. But again, in making the point which he does, the defendant in error assumes a very singular position. It is not pretended that the Kansas City court of appeals in de-

ciding this case held that the question was not properly presented for review, but reliance is placed upon the opinion of the supreme court of the State of Missouri in the proceeding instituted by this plaintiff in error in its endeavor to arrest proceedings in the court of appeals and have the case certified to the supreme court—a proceeding collateral in a sense. At the outset, in the original brief, the plaintiff in error disclaimed any purpose or intention of invoking or relying upon anything that occurred in that proceeding in the supreme court as a foundation for its right to a writ of error in this case, and unquestionably, under the law and under the decisions of this court, such disclaimer was proper; but it is rather a singular position for the defendant in error to take when it appeals to the ruling made in that case to determine whether or not the question was properly raised, since the decision in that court cannot be any ground for determining the right to the writ in this case. So far as the opinion of the supreme court of the State of Missouri in the case of M. K. & T. R'y Co. *vs.* Smith *et al.*, reported in the 154 Mo., is concerned, it is simply available in this case as establishing that the Kansas City court of appeals was the highest court in the State in which a decision could be had in this case. True, it may be referred to, as the decision of any court may be, to ascertain what has been decided in other cases; and since the defendant in error appeals so confidently to the opinion in that case as determining that the Federal question was not properly raised in this case, we may as well now as at any time consider briefly what effect that opinion should have as a persuasive authority, although it cannot be regarded as a conclusive one. That opinion is based

upon a very singular and a very narrow view of the law conferring jurisdiction upon this court to review the decisions of the State tribunals. In that opinion the supreme court of the State stated the contentions of the appellant there (plaintiff in error here), at the trial and in the court of appeals, to have been of the same nature (154 Mo., 312), and notwithstanding the court had quoted at the bottom of page 311 a paragraph from the opinion of the Kansas City court of appeals, setting forth the contention of the appellant, to the effect that because the injunction bond sued on was given in a proceeding in a United States court, the damages must be fixed and determined according to the rules and practice of the Federal courts, and since attorneys' fees are not an element of damages in such courts and on such bonds, therefore the State courts should apply the same rule in a suit upon such bond as the Federal court would, yet that court said:

"That a Federal question could have been raised cannot be denied, but that such question was not raised is manifest."

Then the opinion proceeds to give the reasons why the Federal question was not raised, and in this connection used language which clearly indicates that in that particular case the court was dealing primarily, if not entirely, with the question of the State appellate jurisdiction, and as to whether or not the Kansas City court of appeals had jurisdiction in the case, or whether the question was so presented as to have taken the case to the supreme court of the State. While, with all respect to that court, we still are of the opinion that the question was so involved and presented as to give the supreme court jurisdiction of the

appeal in the case, yet the decision of the Kansas City court of appeals and of the supreme court of Missouri, to the effect that the appeal was properly granted to the Kansas City court of appeals, and therefore that court had power and authority to determine the case, must be taken as conclusive by all parties at this time, notwithstanding this court may in the end reverse the judgment of the Kansas City court of appeals, in which it held that the State courts were not required to enforce the contract in accordance with the law governing in the Federal court where the bond was made.

Recurring to what was said in that case as to whether or not the question had been properly raised, the court, at page 313 of the report, used this language:

"To us the contention of relator does not seem tenable. We fail to discover from the record anywhere 'the validity of a treaty or statute of or authority exercised under the United States is drawn in question' or that a Federal question may be said to be involved in the case. In fact both the petition and the answer in the case before the trial court recognize the validity of the bond and the action of the Federal court in all orders regarding or affecting the same. It is upon the bond as a valid instrument issued by order of proper authority that plaintiff's suit in the circuit court is predicated, and the relator's answer (as defendant) in that suit admits that it executed the bond under the facts stated in the petition, and by way of defense thereto the relator simply answered that the injunction suit in which said bond was given was a mere incident to a main suit then pending between the relator and said John S. Elliott, and that for dissolving the injunction under such circumstances attorneys' fees are not allowable as an item of damages."

And also:

"If no challenge of authority exercised under the United States is in fact made by the record, the mere assertion of

its existence by counsel, coupled with the further fact that such a question might have been made under a proper answer, or by the development of a proper state of facts during the progress of the trial, will not suffice to deprive the Kansas City court of appeals of its jurisdiction to hear and determine upon the case as it reached that court, or to invest this court with jurisdiction thereof."

And then again, on page 315, that court said:

"Neither the rules, the practice or procedure, nor the mode and manner of administering the law in the United States court, applicable to the liability of bondsmen on an injunction bond given in that court, can in anywise be drawn in question, so as to present a Federal question in a suit in a State court on the bond, *when its validity*, as in the case of Elliott against the relator railway company, begun in the Cooper county circuit court and now pending on appeal in the Kansas City court of appeals, *is admitted and where no question as to the court's authority to order the bond as given is or was made by the relator.*

"As said, the relator, as defendant in the suit now pending in the Kansas City court of appeals on appeal, contested the issue by an answer that in no way drew in question authority exercised under the United States, nor did it set up any claim of right by authority exercised under the United States, *as abridged or taken away*, nor did it deny that the State court, wherein the suit was instituted, had *authority to hear and determine the case*."

And then again, on page 316:

"The *validity* of no statute, treaty or authority exercised under the United States being drawn in question by the relator's answer in the suit on the bond in the Cooper county circuit court that would operate, under article 6, section 12 of the constitution of this State, to divest the Kansas City court of appeals of jurisdiction thereof, hence, no authority, in this court by a writ of prohibition to order that court to stay proceedings therein or to transfer the case here for final disposition on that account, as asked by relator."

These extracts from the opinion show that the court was in fact dealing with the question only for the purpose of determining to which court the appeal would lie, and in harmony with its former decisions upon analogous questions held that the question of appellate jurisdiction was to be ascertained from the record existing in the trial court at the time the appeal was granted. Assuming that the court was right in other particulars, we may agree that that statement was correct; but what I specially desire to direct attention to now is the reason that the court gave for its conclusion that no Federal question was raised, although it is conceded that it might have been. This statement in the opinion is seized upon with much avidity by counsel for defendant in error and presented in his brief as a conclusive reason why this court cannot now entertain this case, and that reason is that this plaintiff in error, as the original defendant in the case, did not *deny the validity of the bond sued upon or of the authority exercised by the United States court, and did not question the right of trial in a State court.* Unquestionably the State court had jurisdiction to try the case. No one has ever contended against that. In fact, it was the only court under all the facts in this case which could have originally maintained jurisdiction. The defendant, although a non-resident of the State of Missouri, could not remove the case to the United States circuit court, because the plaintiff (defendant in error here) sued for just exactly $2,000 to prevent that removal. But because the State court had jurisdiction to try the case, it does not follow that it was justified in trying it upon any other than the correct theory of the law, nor that it should have ignored the law of the jurisdiction in

which the contract was made, and render a judgment upon some other theory of law that cannot by any process of reasoning be claimed to have entered into and become a part of that contract. But the court says, further, that you cannot have a Federal question in a case unless you deny the validity of some law or authority under the United States. The reason, as that court said, that there was no Federal question in this case was not because the defendant there, plaintiff in error here, did not claim that by reason of the fact that the bond was given in a Federal court, and as in such cases attorneys' fees were not an element of damages, it was not liable for the same. On the contrary, that is stated to have been the contention of the defendant, but such contention, it says, did not involve a Federal question. It did not involve an authority exercised under the United States, because it did not *deny the validity of the authority* exercised under the United States. Under the decision of the supreme court of Missouri in that case of the Railway Company *vs.* The Judges of the Kansas City Court of Appeals, and under the contention of the defendant in error, based upon that opinion, that provision of the constitution and the power of this court under it become an absolute nonentity.

If we cannot invoke in a practical and beneficial way the authority exercised under the United States by asserting that it is a valid authority, and thereby make a Federal question, then there is no benefit to be accomplished, through those provisions of the law, by a party invoking the protection of authority under the United States, and the jurisdiction of the courts to adjudicate upon the same. If, as contended by the plaintiff in error and as ruled by the

supreme court of Missouri, we must deny the validity of the authority under the United States before we can put a case in shape to invoke the jurisdiction of the courts of the United States, then we have no use for the jurisdiction of those courts. If the State court should decide that the authority of the United States was void, it would necessarily decide that there could be no recovery, and that would be the end of the matter, but here is a case, and there may be many others similar to it, where a party is forced into court and is compelled to engage in tedious litigation, and in the progress of that litigation it becomes necessary to do many things, and, among others, to enter into an injunction bond. A party has invoked the power of the court, which resulted in giving the injunction bond in order that he might have the benefit and the protection of the authority of the United States, which that court was exercising, and when he invoked that authority he did it with reference to the rules of law controlling the practice in that jurisdiction, and when the court made an order it made it with reference to the rules of law governing the practice in that jurisdiction, and when a bond, as a step in that proceeding, was entered into, it was with reference to the same rules of law governing the practice in that court, and all of it was claimed to be perfectly valid and lawful, otherwise the authority would not have been exercised by that court, and afterwards when the party is sued upon that obligation and an effort is made to recover from him something entirely outside and beyond the rules of practice which had governed theretofore, as before stated, he invokes that authority of the United States as his protection and shield, and says because this valid authority was exercised in a lawful manner it does protect him against the rendi-

tion of any judgment beyond what was contemplated and comprehended in the just and lawful exercise of that authority under the United States. Necessarily he invokes that authority as a *lawful* exercise of the power of the United States as a defense in his case, yet he is told by the supreme court of Missouri that because that was a *valid* proceeding from beginning to end it is not to be regarded as a Federal question. It is to be ignored, set aside, and a liability imposed upon an entirely different theory, because the party invoking the authority of the United States says it is a valid authority, and since the State court, in effect, decides that it is a meaningless exercise of power unless it is a void one, therefore there is no such Federal question presented as will justify an appeal to this court for a review of the decision of the State court. Such a position cannot be maintained.

In addition to the cases cited under point I of the original brief (page 16), the following other cases establish that it is not necessary to deny the validity of the authority invoked as a protection:

A Federal question is involved and presented in a case "where the marshal of the United States had levied an execution upon certain property under a judgment in the circuit court, which was taken out of his custody by a writ of replevin issued by a State court, and the supreme court of the State decided adversely to the claim of the marshal, and it is within the jurisdiction of this court to review the decision."

Clements *vs.* Berry, 11 How., 398.

"This court has jurisdiction in error over a judgment of the supreme court of Louisiana, in a suit by one citizen of

that State against another for the foreclosure of a mortgage on real estate therein, when the only controversy in the case is as to the effect to be given to a sale of the property under an order of the district court of the United States in bankruptcy, to sell the bankrupt's mortgaged property free from encumbrances."

Ins. Co. *vs.* Murphy, 111 U. S., 738.

A Federal question is involved which will give this court jurisdiction "whenever a State court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and of the parties."

Dupasseur *vs.* Rochereau, 21 Wall., 130.

Emboy *vs.* Palmer, 107 U. S., 3.

The decision of the highest court of a State upon a motion, accompanied by affidavits as proof, to perpetually enjoin the collection of a judgment obtained in a court of the State on the ground of the discharge of the defendant in bankruptcy, raises a Federal question which may be reviewed by this court.

Palmer *vs.* Hussey, 119 U. S., 96.

A suit prosecuted in the State courts to the highest court of such State against a marshal of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper Federal court, presents a case for a writ of error to this court when the judgment is against the claim of the marshal.

Etheridge *vs.* Sperry, 139 U. S., 266.

Buck *vs.* Colbath, 3 Wall., 240.

Failure to give proper effect to the decree of the circuit court of the United States in a suit in a State court presents a question which is within the jurisdiction of this court to consider.

Cent. Nat. Bank *vs.* Stevens, 169 U. S., 432–456.

Even at the expense of repeating some things that are to be found in the original brief for the plaintiff in error in this case, I wish to answer, as briefly as I may, the further contention of the defendant in error to the effect that a Federal question was not raised. Here it should be noted that this contention is restricted very cautiously by counsel for defendant in error to what he has to say concerning the presentation of the question to the trial court. It is not claimed now that the question was not presented to and was not decided by the Kansas City court of appeals. I ask the court to consider what is said in the original brief concerning the meaning of the petition and the defense in this case. The allegations of the petition clearly bring before this court, as they must have brought before the circuit court of Cooper county, the proceeding in the United States court, the application for the injunction, the order of the court requiring the bond as a condition for granting the injunction, and the rules of law applied in Federal courts as indicating the proper measure of damages to be recovered under the obligation of that bond. In addition to the authorities heretofore cited as to what enters into and becomes a part of the bond, I cite the court to the case of Schuster *vs.* Weiss, 114 Mo., 158. That was a suit upon an appeal bond given on an appeal in a case appealed from the circuit court of the city of St. Louis, and dated May 31, 1884. That was

prior to the amendment of the constitution of 1884, creating the courts of appeals and changing the jurisdiction of the supreme court, which has been several times mentioned in this case. As the constitution then stood, the case was appealable to the St. Louis court of appeals, and the bond was conditioned that if the appellant should prosecute his appeal with due diligence to a decision in the St. Louis court of appeals, etc. Before the case was reached in that appellate court the constitutional amendment went into effect, and on the 4th of March, 1885, following, the legislature of the State passed a law providing for the transfer from the St. Louis court of appeals to the supreme court of all cases in which the supreme court would have jurisdiction by virtue of the amendment to the constitution. That being a case of that kind was duly certified to the supreme court, where subsequently the judgment was affirmed, and thereupon action was brought upon the appeal bond against certain of the sureties, who defended upon the ground that the law as it existed at the time the bond was made determined the obligations and liabilities of the parties, and since that law had been amended as it had been and the jurisdiction to hear the case had been taken from the St. Louis court of appeals, there was such change in the contract as released the sureties.

In disposing of that question the supreme court of Missouri said, beginning at page 173 of the report, as follows:

"While the legislature deprived the suitor of a hearing in the court of appeals, it at the same time secured him a hearing in the court of last resort in the State. But it is altogether a different proposition as to his sureties. They are not parties to the suit. They are obligors in a collateral undertaking. They entered into a private contract with

Mrs. Schuster and agreed to be bound on certain conditions. Over their contract was the protection of the constitution. *That contract was made with reference to the law as it then stood. In the light of that law it must be read.* After it was made it was secure from any act of the legislature or amendment to the constitution impairing its obligations (Gunn. *vs.* Barry, 15 Wall., 610; Waterworks Co. *vs.* Rivers, 115 U. S., 674; Black on Constitutional Prohibitions, sec. 4). * * * The bond was drawn *with reference to the form of procedure subsisting at the time.* They could not anticipate a different mode. * * * Our conclusion is that while the act of the legislature in question is constitutional and binding on the parties, that it impaired the obligation of those defendants (the sureties), imported new and different conditions into the bond, and hence worked a discharge of the defendants."

When the existing law and existing methods of procedure so enter into a contract in the form of an appeal bond as that any change in the law would release the sureties, as decided in the above case, it certainly is not going too far to say that the law and the rules of procedure existing and controlling in a Federal court, where an injunction bond is given, afford the proper guide for any court in which a suit upon that bond may be brought. To the same effect are Olcutt *vs.* Supervisors, 16 Wall., 690; Burgess *vs.* Seligman, 107 U. S., 20, and cases under point I, page 17, of original brief.

In Cox *vs.* The United States, 6 Pet., 172, a bond executed as at Washington city was sued on in the district court of the United States in the State of Louisiana, where the law of that State was applied in adjusting the liability of the sureties. For that reason the judgment was reversed, this court saying, at page 203 of the opinion:

"The general rule on this subject is well settled; that the law of the place where the contract is made, and not where

the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is governed according to the law of the place where it is to be executed. 2 Burr, 1077; 4 Term, 182; 7 Term, 242; 2 Johns., 241; 4 Johns., 285."

Likewise in Duncan *vs.* The United States, 7 Pet., 435, a bond to the United States was sued on in the district court of the United States in Louisiana. In that case the court refused to apply the law of Louisiana, and on writ of error by the defendant this court affirmed the judgment, holding (page 446) that although the bond was signed in New Orleans, yet "this, and all similar bonds, must be considered as having been executed at the seat of government of the United States, and to be governed by the principles of the common law." * * * (Page 449:) "This is an official bond, and was given in pursuance of a law of the United States. By this law the conditions of the bond were fixed, and also the manner in which its obligations should be enforced. It was delivered to the Treasury Department, at Washington, and to the Treasury did the paymaster and his sureties become bound to pay any moneys in his hands. These powers exercised by the Federal Government cannot be questioned. It has the power of prescribing, under its own laws, what kind of security shall be given by its agents for a faithful discharge of their public duties, and in such cases the local law cannot affect the contract, as it is made with the Government, and in contemplation of law, at the place where its principal powers are exercised."

In Bank of U. S. *vs.* Donnally, 8 Pet., 361–372, Mr. Justice Story said:

"The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts are to be governed by the law of the country where the contracts are made, or are to be performed. But the remedies are to be governed by the laws of the country where the suit is brought; or as it is compendiously expressed, by the *lex fori*."

Andrews *vs.* Pond, 13 Pet., 65, is to the same effect. There it was said (page 78):

"The defendants allege that the contract was not made with reference to the laws of either State (New York or Alabama) and was not intended to conform to either; that a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due, and that it was concealed under the name of exchange, in order to evade the law. Now, if this defense is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of a security taken upon an usurious agreement, which neither will execute? Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of the kind cannot stand on the same principles with a *bona fide* agreement made in one place to be executed in another. In the last-mentioned cases the agreements were permitted by the *lex loci contractus;* and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere, and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine."

In Scudder *vs.* Bank, 91 U. S., 406, it was held:

"Where a bill of exchange was drawn by a party in Chicago upon a firm in St. Louis, and verbally accepted by a member of the firm then in Chicago, the validity of such acceptance was to be determined by the law of Illinois."

In Liverpool Steam Co. *vs.* Phœnix Ins. Co., 129 U. S., 397–458, it was said:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country."

In Equitable Life Society *vs.* Clements, 140 U. S., 226, it was held, although a policy of insurance was formally dated and signed in New York by the company doing business in Missouri, upon an application made in Missouri and made part of the contract, and to take effect only upon payment of the first premium, which was paid in Missouri and the policy there delivered, that such policy was a contract made in Missouri, and therefore to be governed by the laws of that State.

This, in connection with what is said in the original brief, is submitted in support of our contention that the case so necessarily involved the authority exercised by the United States court and involved the proper construction of that authority and the law applicable at the time and place where the bond was made as to present a Federal question, and as to involve a determination of that question in any final adjudication that might be made in a suit upon such bond.

It is contended by counsel for defendant in error that the

answer did not say in terms that an authority under the United States was invoked; that it did not say in specific words that the law, as applied and administered in the United States courts, precluded attorneys' fees as damages upon an injunction bond; that it did not say in terms that in making such defense the defendant intended to present and raise a Federal question. The petition alleged the facts that necessarily involved the authority that had been exercised by the United States court, and as a logical consequence presented every question of law necessary for a proper judgment upon the facts thus alleged, and likewise the answer, although it was a general denial, put in issue everything essential to the plaintiff's case. Even if the practice which prevailed in Missouri some years ago was still in vogue and special denials were required, there would have been no more specific mention of the Federal question than there is in the answer as it was filed in this case. It is not necessary to plead the law. If it had been attempted it would have been bad pleading. What more, I ask, could the defendant in that case, observing the rules of pleading, have said? Would it have been proper to say, after admitting those things which were admitted and denying the other allegations of the petition, either generally or specifically, to have gone on and by way of further defense set up the law as it was administered in the Federal courts? Or would it have been expected that in the answer the defendant would have said that this defense, which denies the right to recover, that the plaintiff has alleged in his petition, is invoking an immunity under the law, as it is applied in the exercise of the authority of the Federal courts, or that, by making this de-

fense, the defendant now raises a Federal question in this case? Certainly, any such statement in the answer would have been condemned as bad pleading, and, so far as pleading is concerned, it would have been regarded as surplusage. To have made any such statement in the answer would have been stating simply a legal conclusion, and that legal conclusion is as much involved in the allegations of the petition and in the admissions and denials of the answer as if specifically stated. I submit there is nothing in that contention of the defendant in error. True, there were other defenses, as is contended, but certainly it does not cut out a Federal question which arises under one defense in the case, because there may be other defenses which do not involve the Federal question, unless the decision of the case was finally and conclusively reached upon some other question.

As already suggested, in the case at bar none of the other defenses, if decided in favor of the plaintiff, could eliminate the defense which rested upon the authority of the United States court. Every other one of the defenses might have been decided in favor of the plaintiff, and yet he could not have recovered, unless the court also decided in his favor upon this particular defense. The very fact, therefore, that the judgment was for the plaintiff is conclusive proof that this question arising out of the rules governing the exercise of authority by the United States court was decided, and decided adversely to the defendant, plaintiff in error here, and, if decided, then it must have been set up and claimed. It is said, farther, there were no instructions asked which called for a ruling of the court upon this question. Since a ruling favorable to the defendant

would have necessitated a judgment in its favor, manifestly the request for a peremptory instruction brought that question clearly before the court as a matter essential to the plaintiff's case. While it is true that some of the instructions prayed by the defendant were directed to the other defenses, yet there is no other defense in the case to which the second instruction prayed by the defendant (Record, p. 37) can be ascribed, except this one which we contend presents the Federal question. There the court was asked to declare the law as follows:

"The court declares the law to be that the plaintiff is not entitled to recover as damages on the injunction bond sued on, any sum which he may have paid out or become liable for as attorneys' fees."

That had but one meaning and could have but one application, and that meaning and application are just as plain and just as certain as they would be if the defendant had added to the instruction some such reason as this:

"Because the law, as applied in United States courts, entered into and became a part of the bond sued upon, and because such law does not authorize a recovery of attorneys' fees on such bond, and this reason is presented as a claim of immunity under the authority of the United States, and therefore presents a Federal question."

While it would have seemed absurd to make such an addition to the instruction, yet that is the principle upon which it is based and which was necessarily brought to the mind of the trial judge when he refused that request. Counsel is careful not to say that the question was not considered by the lower court, but simply that the form in which the record is made up does not on its face disclose it; nor could such a statement be made, for it is known that in

the trial court the cases of Bein *vs.* Heath and Oelrichs *vs.* Spain from this court were relied upon by the defendant, while the case of Walsh *vs.* Lackland, 8 M. A., 122, was relied upon by the plaintiff and was adopted by the trial court as the basis of its ruling. But probably all this discussion is unnecessary, since there is no contention by the defendant that the question was not presented to and decided by the Kansas City court of appeals, nor is any answer attempted to what is said upon this subject at pages 79 to 82 of the original brief, by which we attempted and think we successfully established that the court of appeals understood that the question was in the case, and, without questioning or criticising the manner in which it had been brought in or whether it had been presented in time, the court, acting upon the questions presented by the briefs of counsel in that court, stated the contention of the appellant there (plaintiff in error here), and then proceeded to discuss and adjudicate that question, and decided it adversely to this plaintiff in error (Record, pp. 66 and 68). Since the question was presented to the court of appeals, and since that court entertained the question, considered it, and decided it, and since that was the highest court of the State in which a decision could be had, under the rulings of both that court and the supreme court of the State, it is sufficient for the purpose of having the case reviewed in this court.

Concerning the time and manner of presenting the Federal question, I submit the following cases, in addition to those cited in the original brief:

In Davis *vs.* Packard, 6 Pet., 41, the claim of immunity from suit in the State court because the defendant was con-

sul general to the King of Saxony was made for the first time in the court of errors of the State of New York. A motion to dismiss the writ of error was filed in the Supreme Court of the United States on the express ground that the claim was not made in time to be considered matter of record in the case for the purpose of conferring jurisdiction for a review of the judgment of the court of errors, as the highest court in the State of New York. The motion was denied, the court stating in the opinion:

"It has also been settled that in order to give jurisdiction to this court under the twenty-fifth section of the judiciary act, it is not necessary that the record should state in terms that an act of Congress was in point of fact drawn in question. It is sufficient if it appears from the record that an act of Congress was applicable to the case, and was misconstrued, or the decision in the State court was against the privilege or exemption specially set up under such statute. How stands the record, then, in this case? Charles A. Davis alleges that he is consul general of the King of Saxony in the United States, and that he is thereby privileged from being sued in the State court, according to the Constitution and laws of the United States. The fact of his being such consul is not denied by the joinder in error. The answer given is, that it nowhere appears by the record, proceedings or judgment of the supreme court (the trial court), that the said Davis was such consul; and the court of errors, in giving judgment, say, after having examined and fully understood the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of Congress, which declares that the district court of the United States shall have jurisdiction, exclusively of the courts of the several States, of all suits against consuls and vice-consuls.

"The question before this court is not whether the judgment of the supreme court in New York was correct. It is the judgment of the court for the correction of errors, that is to be reviewed here. That is the final judgment in the highest court in the State, and none other can be brought

into this court, under the twenty-fifth section of the judiciary act.

"Whether it was competent for Davis in the court of errors to assign, as error in fact, his exemption from being sued in a State court, is not a question presented by the record. No such question appears to have been raised or decided by the court. And, judging from the ordinary course of judicial proceedings in such cases, we are warranted in inferring that no such question could have been made. * * * From the record, then, we are necessarily left to conclude, that the State court, assuming or admitting the fact that Davis was consul general, as alleged in his assignment of errors, yet it did not exempt him from being sued in a State court; which brings the case within the twenty-fifth section of the judiciary act; the decision having been against the exemption set up and claimed under a statute of the United States. The motion to dismiss the writ of error is accordingly denied."

In Armstrong *vs.* Treasurer of Athens County, 16 Pet., 281, the jurisdiction of this court was sustained, although the record did not disclose that the Federal question had been directly raised at any stage of the proceeding. After stating that it must be shown by the record that the point was made, "either by express averment or by necessary intendment, in the pleadings in the case," and after stating that there was a certificate from the presiding judge of the supreme court of Ohio, this court said:

"We presume that the certificate of the presiding judge was made by authority of the court; and as this bill and answer show that such a point might have arisen, and this certificate on the record states that it did arise and was decided, the case comes within the fourth clause above mentioned, and this court must take jurisdiction and examine whether the point so certified was rightfully decided."

In the case at bar the petition and answer "show that such a point might have arisen" in this case, while the

opinion of the Kansas City court of appeals, more clearly and more conclusively than the certificate from the Ohio court, shows that it actually did arise and was decided adversely to this plaintiff in error.

In Water Power Co. *vs.* Canal Co., 142 U. S., 254–269, this court said:

"Notwithstanding the inhibition of the Constitution is not distinctly put in issue by the pleadings, nor directly passed upon in the opinion of the court, it is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law. This court has had frequent occasion to hold that it is not always that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the State court (Willson *vs.* Blackbird Creek Marsh Co., 2 Pet., 245; Armstrong *vs.* Athens County, 16 Pet., 281; Chicago Life Insurance Co. *vs.* Needles, 113 U. S., 574; Eureka Lake Co. *vs.* Yuba County, 116 U. S., 410)."

The rule is stated in Morrison *vs.* Watson, 154 U. S., 111–115, as follows:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a State, on the ground that it decided against a title, right, privilege or immunity claimed under a treaty or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law of the State, as declared by its highest court, could not be considered by that court; *or if it was not claimed in any form before judgment in the highest court of the State*, it cannot be asserted in this court."

In Tregea *vs.* Modesta Irrigation District, 164 U. S., 179–184, it was said:

"A motion was made to dismiss this case on the ground of the lack of a Federal question. It appears from the opinion of the supreme court of the State that the defendant contended before it that the attempt to bind the reconstituted district by a vote of the district prior to such exclusion in respect to the issue of bonds was in violation of section 10, article I of the Constitution of the United States; and that it overruled and denied such contention. So there was considered by the supreme court of the State the distinct question of an alleged conflict between the proceedings confirmed by the decree of the lower court and rights claimed under the Constitution of the United States, and the decision was against those rights.

"Further the real contention of the defendant was and is that the operation of this statute is to deprive him of property without due process of law.

"The burden of his case from the first has rested on the alleged conflict between proceedings had under the irrigation statute and the Federal Constitution; so that beyond express declaration in the opinion of the supreme court of the State we may look to the real matter in dispute, and these unite in forbidding us to say that no Federal question was presented. The motion to dismiss on that ground must be overruled."

In Central Nat'l Bank *vs.* Stevens, 169 U. S., 432–456, the jurisdiction of this court to review the judgment of the highest court of a State was sustained on the presentation of the Federal question ponu assignments of error in such State court.

Even if there had been no such question raised in the trial court, it could, under the practice in Missouri, have been raised for the first time in the appellate court.

That a petition does not state facts constituting a cause of

In addition to the cases previously cited, I ask attention o the following:

Huntington *vs.* Attrill, 146 U. S., 657, was error to the court of appeals of Maryland. The bill in that case alleged he recovery of a judgment in New York against the defendant n account of a false certificate made by him as a director of a New York corporation, by reason of which he became liable nder the New York statute for the debts of the corporation. The bill was demurred to on the ground that it appeared hat the recovery was of a penalty under the New York tatute. This was all that appeared as to the facts or the aw applicable thereto or as to any claim under any law of he United States.

The demurrer was overruled in the trial court, and on ppeal the court of appeals reversed the judgment, holding hat the courts of Maryland would not enforce a judgment f New York for a penalty. A writ of error was sued out rom this court, and the jurisdiction was sustained and the dgment of the State court reversed. On page 666 the ourt said:

"It thus appears that the judgment recovered in New ork, was made the foremost ground of the bill, was fully iscussed and distinctly passed upon by the majority of the ourt of appeals of Maryland, and was the only subject of he dissenting opinion; and that the court without conidering whether (other reasons might entitle plaintiff to ave certain transfers of property annulled) declined to aintain his right to do so by virtue of that judgment nply because the judgment had, as the court held, been covered in another State in an action for a penalty.

"The question whether due faith and credit were thereby enied to the judgment rendered in another State is a Fedal question of which this court has jurisdiction on this rit of error. Green *vs.* Van Buskirk, 5 Wall., 307, 311; apo *vs.* Kelly, 16 Wall., 610, 619; Dupasseur *vs.* Rocheau, 21 Wall., 130, 134; Crescent City Co. *vs.* Butchers' nion, 120 U. S., 141, 146, 147; Cole *vs.* Cunningham, 133 S., 107; Carpenter *vs.* Strange, 141 U. S., 87, 103."

In Marchant *vs.* Pa. R. R., 153 U. S., 380, the facts upon which the Federal question was based did not appear in the record, nor did it appear that there was any claim under the United States Constitution prior to the assignments of error in this court, and yet the court entertained the case, and, having fully considered the question, affirmed the judgment of the State court instead of dismissing the writ of error.

Scott *vs.* McNeal, 154 U. S., 34, was in error to the supreme court of the State of Washington. That was an action of ejectment. On the trial defendant relied on an administrator's deed, and when the same was offered in evidence the plaintiff objected to it and to the proceedings in the probate court on the ground that they were void, because there could be no valid administration on the estate of a *live* man, and the probate court had no jurisdiction to make the orders in question. This objection was overruled and judgment entered for defendant.

Nothing farther appears from the record to have been done in the trial court.

No claim was made in that court of any constitutional right or protection whatever. An appeal was taken to the supreme court of the State.

"In that (the supreme) court, it was argued in his (appellant's) behalf 'that to give effect to the probate proceedings under the circumstances would be to deprive him of his property without due process of law.' But the court held the proceedings of the probate court to be valid, and therefore affirmed the judgment. 5 Wash. St., 309."

This is the only statement in the report of the case intimating that there might be a Federal question in the case, and that only occurred when the case was presented to the appellate court. It was contended that the record did not properly present a Federal question. Without specially noticing that objection, the court entertained jurisdiction and proceeded to a full consideration of the case and reversed the judgment of the State court.

action may be raised for the first time in the appellate court in Missouri.

Smith *vs.* Burnes, 106 Mo., 94.
Lilly *vs.* Menke, 126 Mo., 190–211.
Benham *vs.* B'ld'g Co., 60 M. A., 34.
Childs *vs.* R. R., 117 Mo., 414–426.
McPeak *vs.* R. R., 128 Mo., 617–635.

The petition in the case at bar comes clearly within the rule of the above cases, because not only does it not state a cause of action, but it states facts which conclusively establish that the plaintiff was not under the law entitled to recover, as attempted in this case.

The rule of law arising from the exercise of authority by the United States court to be applied to the allegations of the petition precludes the right of recovery on the facts stated

Since it was in time under the State practice to first raise the question in the court of appeals; since it is not disputed that it was raised in that court, and since when raised in that court it unmistakably claimed immunity from liability by virtue of the authority exercised by the United States court, there can be no logical ground of opposition to the contention of plaintiff in error, regardless of what may be said or claimed relative to any other feature of the case.

The defendant in error proceeds farther in paragraph III of his brief to argue that notwithstanding the rule laid down by this court and followed and applied in the United States circuit courts, yet it was entirely proper for the State court to ignore that rule and permit a recovery for attorneys' fees in this case. This argument consists

largely in an extended extract from the case of Aiken *vs.* Leathers, from the State of Louisiana. As was remarked in our original brief, that case was an argument to show why the rule ought to be otherwise than held by this court concerning attorneys' fees in such cases; but even if that argument was sufficient to convince this court that it ought to change its ruling, it could have no bearing upon this case, because, under the authorities cited, it is the duty of every court to hold that the law in force at the time and at the place and in the jurisdiction when and where the bond was executed is to be considered as imported into the bond and constituting a part of its terms and conditions; but the case of Aiken *vs.* Leathers is based largely upon a misconception of the case of Meyers *vs.* Block, decided by this court and reported in 120 U. S., 106. It is true that in Meyers *vs.* Block this court distinguished between that case and Bein *vs.* Heath, and to a certain extent modified the ruling of the latter case; but there were two propositions involved in Bein *vs.* Heath. First, that attorneys' fees were not properly to be considered as an element of damages upon an injunction bond given in the United States court, and that it would constitute manifest error to subject the parties to an action upon such bond to the laws of the State; and, second, that no action could be maintained upon such bond conditioned for payment of such damages as might be *adjudged* against the principal, unless there had *previously* been an adjudication of such damages. It was to this second proposition that the case of Meyers *vs.* Block was addressed. It did not pretend to review the decisions of this court, holding that attorneys' fees were not a proper element of damages

on such bond. The opinion will be searched in vain for any statement to justify that assumption. It does not appear of what the damages consisted in Meyers *vs.* Block. There were certain laws of the State of Louisiana which were involved in the decision of the case, but which did not in themselves relate to attorneys' fees, and it was of those other laws that the assignment of error spoke when in the first paragraph it was said the supreme court of Louisiana erred in subjecting the plaintiffs in error to the law and jurisprudence of Louisiana, when they were parties to an injunction bond given in and by order of a Federal court. As suggested in the previous brief, the only basis for the jurisdiction of this court was the fact that the bond, having been given in a suit in the Federal court, involved the exercise of authority under the United States, and it therefore presented a Federal question, and upon that presentation of the question, much more vague than in the case at bar, the court entertained jurisdiction and then affirmed the judgment on the theory of the distinction that was made between that case and Bein *vs.* Heath, not, however, by virtue of the law of Louisiana, but by reason of the changes of practice in the Federal courts, and partly by reason of a different view which this court entertained as the correct interpretation to be put upon the condition of the bond, namely, the payment of such "damages as he may *recover* in case it should be decided that the injunction was wrongfully issued." When properly understood, Meyers *vs.* Block is no authority at all upon the merits of the Federal question involved in this case, namely, that attorneys' fees cannot be recovered upon such injunction bond, while it is a direct authority in favor of the plaintiff

in error that a suit upon an injunction bond given in the Federal court involves a Federal question and presents it in such manner and at such time as to justify a review of the case by this court. In addition to the cases previously considered in our former brief, namely, Aiken *vs.* Leathers (La.), 3 Southern Rep., 357; R. R. *vs.* Shephard, 1 Mo., 254; Walsh *vs.* Lackland, 8 M. A., 122, and Mitchell *vs.* Hawley (Cal.), 1 Pac. Rep., 833, counsel for defendant in error cites 1 Spelling on Extraordinary Legal Remedies, sec. 954; R'y Co. *vs.* Brown (Ky.), 36 S. W. Rep., 555; Corcoran *vs.* Judson, 24 N. Y., 106, and R'y Co. *vs.* Smith, 154 Mo., 300. I respectfully direct the court to what was said in the former brief concerning the first four of these cases, and with reference to the others submit that in so far as the case of Railway Co. *vs.* Smith, 154 Mo., 300, is concerned, it adds nothing by way of reason or logic to the cases criticised in the former brief, for the reason that it simply cites them and quotes the extract which I think we have shown to be wholly unsound. And so Spelling on Extraordinary Legal Remedies simply says, "While counsel fees are not recoverable on injunction bonds in the Federal courts, yet that fact does not preclude recovery of such damages in an action in a State court on an injunction bond given in a United States court," and then cites several of the cases mentioned above. It will be noticed that the author deals with this as a "fact," and loses sight of the real fact, namely, that what accomplishes the condition is a rule of law, which of necessity must have entered into the contract; and when we turn to the decisions cited by that author, and which are adopted by counsel for defendant in error, we find that

the case of Corcoran *vs.* Judson, 24 N. Y., —, has no bearing whatever upon the subject. While it is true that attorneys' fees were allowed in that case, yet it was not a bond in an injunction suit, nor given in a case pending in a United States court, but was a bond given pursuant to an act of Congress, with reference to a claim made under the treaty between the United States and Mexico, and as a preliminary to instituting a suit for an injunction.

Moreover, it does not appear, and was not claimed, that there was any rule of law in force or applied in any jurisdiction which precluded attorneys' fees as damages upon such bond, and, still farther, if we were to treat this as entirely parallel with the bond sued on in this case, we would find that no such point was made as is now made in the case at bar.

In the case of Railway against Brown, from Kentucky, reported in 36 S. W. Rep., there is no similarity at all with the case at bar, outside of the fact that the bond sued on had been given in the United States court. The only point decided was that a State court could entertain jurisdiction of an action upon such bond. In this respect I submit that there is no case which has been cited by defendant in error that suggests any logical reason for applying the rules applicable to bonds given in State courts as the proper guide for measuring damages upon bonds given in the Federal courts, when it is conceded that a different rule prevails in the Federal courts. It is recognized everywhere that a chancellor has the right to impose the terms on which he will grant an injunction. There is no question but that Judge Philips, when he granted the injunction in the United States court, and required the bond sued upon in this case, might have

specified the damages that were to be recovered upon the bond in the event of a breach, and he might have said that in the event of a dissolution of the injunction the principal and sureties on that bond should pay to the opposing party all damages that might occur by reason of the injunction, but that it was understood that no attorneys' fees were to be included in any estimate to be made of such damages. What else can be fairly deduced in this case except that that is just what the honorable judge meant when he required this bond to be given? Unquestionably he was exacting that bond with reference to the rules of law and practice governing in his court. He was not sitting upon that bench to apply and enforce the law in accordance with the rulings of this court and then require obligations from litigants in his court involving some liability to be determined by rules of law that would be ignored in his court and in this court. He was not to be understood as importing into a contract, which he required to be made, and which when made he approved, either directly or through an officer of his court, rules of law which he repudiated as a judge, nor was he to be considered as adopting a measure of damages which that court and this court would say is not correct. If he had intended to depart from the rule as laid down, and the law as applied in the Federal courts, he certainly would have said so, and, not having said so, the only presumption that can be indulged is that, exercising the authority of a judge of the United States court, administering the law in accordance with the decisions of the highest tribunal having control over United States courts, he intended that the parties should make the bond with reference to that law

and should assume a liability only to the extent that the Federal courts declare to be the proper measure of damages in such case. I submit that there is nothing presented in the brief for the defendant in error which justifies an affirmance of the judgment of the Kansas City court of appeals. On the contrary, the points there made only emphasize the reasons why this court should now reverse the judgment of that court, because there was presented and decided in the case, as submitted to that court, a Federal question, and because that decision was adverse to the plaintiff in error, and because without that adverse decision there could have been no judgment whatever against the plaintiff in error.

For these various reasons I submit the judgment must be reversed.

GEO. P. B. JACKSON,
For Plaintiff in Error.